SAMY VELLU SANGLIMUTHU *a*

v.

PERIASAMY SANGILI

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL RAZAK J
[CIVIL SUIT NO. F79 OF 1983] *b*
27 SEPTEMBER 1983

CIVIL PROCEDURE: *Injunction - Interlocutory application for mandatory injunction - For vacation of land - Locus standi of residual beneficiary - Registration of transfer - Effect of - Contradictions between agreements and transfer form - Question to be tried - Delay in application - Effect of.* *c*

LAND LAW: *Registration - Effect of.*

The application was an interlocutory application to order the respondent by mandatory injunction to vacate a piece of land of which the applicant was the registered proprietor. The applicant claimed that he had purchased the land from the respondent's father, now deceased, that in fact the respondent had no *locus standi* against the action being brought *d* by the applicant. The respondent was merely the residual beneficiary, and since no letters of administration had been granted, the respondent had no interest as yet in the land. The respondent, on the other hand, alleged that the deceased had not executed the transfer of the land to the applicant. He claimed that the letter of administration in respect of the deceased's estate was in the process of being extracted and that a claim would in due course be instituted against the applicant. The applicant had earlier served a notice of eviction on *e* the respondent but no eviction proceedings were instituted even after the expiry date.

Held:

[1] The respondent was not prevented from challenging the validity of the applicant's registered title. Section 89 of the National Land Code must be read subject to s. 340, which provides that the finding of fraud and misrepresentation shall be ground to defeat the registered proprietor's title. (*Frazer v. Walker* [1967] AC 559). *f*

[2] The respondent had *locus standi* to defend the action. The applicant had treated the respondent as representing the other members of the family and was estopped from denying that the respondent had no legal authority. In fact, though the respondent had caveated the land, no application had been made by the applicant to have the caveat set aside. The respondent must be deemed to have the necessary capacity to defend until such time as a *g* representative was finally appointed. Equity looks to the intent rather than the form and deems that as done which ought to be done. Further, the respondent was not asserting a positive right of ownership as against anyone. He was merely defending the action and must not be denied the right to do so. (*Lee Ah Thaw v. Lee Chun Tek* [1978] MLJ 173 distinguished; *Combe v. Combe* [1951] 3 KB).

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[3] The applicant's case could not be said to be so conclusive and certain that a trial would clearly be pointless and redundant. There were certain contradictions between what was stated in the agreements and the transfer form, which contradictions could support the respondent's allegations of fraud or misrepresentation, which would affect the applicant's title. In the absence of special circumstances, a mandatory injunction will not be granted.

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[4] There had also been inordinate delay in the filing of the application. A mere delay in applying for a mandatory injunction is not a bar if it can be satisfactorily accounted for. The applicant, however, had not given any explanation for his delay.

[Application dismissed.]

Cases referred to:
Frazer v. Walker [1967] AC 559
Lee Ah Thaw v. Lee Chun Tek [1978] MLJ 173
Combe v. Combe [1951] 3 KB

Legislation referred to:
National Land Code 1965, ss. 89, 340
Rules of the High Court 1980, O. 15 rr. 6A(4)(a), 12(1), 13(1)

Other sources referred to:
Halsbury's Laws of England 4th Edn., Vol. 24, P. 534, 536

For the plaintiff - M/s. Sri Ram, Zulkifly & Kumar
For the defendant - M/s. Karpal Singh & Co.

JUDGMENT

Abdul Razak J:

This is an interlocutory application to order the defendant by mandatory injunction to vacate the land Lot CT. No. 18052 in Lot No. 6130 Mukim of Batu and also to restrain him from entering the said land. The plaintiff had earlier filed a writ for a similar remedy based on grounds which are in effect the same. The application came before me in Chambers wherein it was dismissed. The applicant had indicated he would wish to have further argument in Open Court. Counsel has since however indicated that the applicant has vacated the application. It is time therefore for me to give the reasons for my decision.

In his affidavit in support of his application the applicant said that he was the registered proprietor of the land in question which had been purchased from the father of the respondent and for which the full purchase price had been paid. He claimed that the respondent is in occupation of the land and was a trespasser. He said he had entered into an agreement with his contractor for the construction of a house on lands of which the lot in question formed a part. Since he had not been able to deliver vacant possession to the contractor by reason of the respondent's conduct, he had been put to great hardship and have suffered irreparable damage and was continuing to do so. The respondent admits being in occupation but denies that the plaintiff was the registered proprietor. He says the plaintiff became the registered proprietor fraudulently and through misrepresentation. He says that the plaintiff and the defendant's father, now deceased entered into an agreement (the 1st. Agreement) for the sale to the plaintiff of 2,500 sq. ft. of the said land at RM27,500, subject *inter alia* to written approval being obtained from the appropriate authority for sub-division of the said land within 12 months from the date of the 1st. Agreement failing which the agreement would be terminated. On 24 June 1981 the plaintiff entered into another agreement (the 2nd Agreement) with the deceased for the sale of the remaining 6,602.5 sq. ft. of the land for RM72,623.65. Again, it was subject to the same conditions as to approval of the State authority as in the 1st Agreement. Subsequently, the deceased was purported to have executed the transfer to the plaintiff under Borang 14A in the presence of V.P. Nathan an Advocate & Solicitor of the whole of the said land for a consideration of RM72,623.65. This was effected on 22 February 1982, 5 days after the deceased died on 17 February 1982.

Evidence was adduced to show that for the purpose of stamp duty the plaintiff had filed, in the usual form, in the Stamp Office a statement that he had purchased the whole of the said land for the sum of RM72,623.65. The defendant alleged that the deceased never executed the said transfer and it was therefore null and void and of no effect. He says that the Letter of Administration in respect of the estate of the deceased is in the process of being extracted and a claim will in due course be instituted against the plaintiff for *inter alia* expunging the name of the plaintiff as the registered proprietor. The affidavit went on to say that the plaintiff through his solicitors caused a notice to be served on the defendant requiring him to vacate the said land within one month of the said notice. However, no eviction proceedings were instituted by the plaintiff even after its expiry, even though solicitors for the defendant had notified the plaintiff's solicitors that they would accept service with regard to the eviction proceedings. It states further that legal proceedings against the defendant only commenced on the 14 March 1983 when the above suit was filed. It says that despite the notice to vacate, the plaintiff had restored to unlawful and illegal means to evict the defendant i.e. damaging the fence and house at the said premises. Police reports to that effect were exhibited. There was also an allegation of assault having been made against the defendant's solicitors' clerk, one Ramasen when he intervened to prevent the demolition of the premises, who had also reported to the Police, which report was also exhibited. The defendant further says that the property in question had been caveated by the defendant's brother.

Counsel for the plaintiff, in support of the application for the injunction rested mainly on two principal grounds. First, that the defendant had no *locus standi* to defend the action since being merely the residual beneficiary, his interest arises only after the estate had been fully administered which had not even commenced, since no Letter of Administration had been granted. Counsel pointed out that in *Lee Ah Thaw v. Lee Chun Tek* [1978] 1 MLJ p. 173 the Federal Court had held that the beneficiary of an estate cannot until the administration is completed be a caveator to caveat the land belonging to the estate held by the executor. It said that the plaintiff did not then have sufficient beneficial interest to do so. Secondly, he says the defendant has no defence because in law the document of title is conclusive until the memorial is set aside. Reference is made to s. 89 of the National Land Code for this construction. Section 89 reads:

> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence-
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> (a) that title to the land described therein vested in the person or body for the time being named therein as proprietor; and
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> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by the person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.

Once he said the document of title is registered albeit a fraudulent transfer, it vests the alienated land in the transferee. In support of that proposition, reference was made to the case of *Frazer v. Walker* [1967] AC p. 559.

I shall deal with the second argument first in that order. I need to point out however that whatever *Frazer's* case has to say it does not omit also to say that the immunity from adverse claims which the registration confers does not prevent those specifically excepted by the statute (which His Lordship held there were not relevant for the purpose of that case) from challenging its alleged validity. I do not think it can ever be doubted that for our purpose,

the specifically excepted instances mentioned therein would necessarily have reference to the similar provisos contained in s. 340 of the National Land Code regarding the indefeasibility of title. The latter says that the title of a registered proprietor shall not be indefeasible in the circumstances therein mentioned. It is clearly provided as one of the provisos that the finding of fraud and misrepresentation shall be a ground to defeat the registered proprietor's title. In my view, in the light of the latter provision, s. 89 must constructively, by the usual canon of construction, be read subject to s. 340 otherwise the latter section would have no meaning and effect.

I shall deal next with the question of whether the defendant has *locus standi*. The defendant said that he had not obtained the Letter of Administration but that his brother was in the process of doing so. The summons in Chambers asks for an order to vacate against the defendant, his servants or agents, and members of his family. There was a letter by the plaintiff's Counsel (Exhibit SV3 in the Affidavit of the plaintiff dated 31 May 1983) to the defendant to the same effect saying

> we hereby give you notice that you and all members of your family (including your mother, brother, sisters, etc. and all those residing with you and occupying the said-land) are to vacate the said-land and to give vacant possession of the same to our client within one month from the date of receipt of this letter. If you fail to comply with this notice out instructions are to file eviction proceedings without further reference or notice to you.

There was a carbon copy of that letter sent to the plaintiff and the defendant but there was no copy addressed to any other members of the defendant's family nor other occupants of the said land. The defendant in his affidavit replying to the plaintiff's affidavit in support of the application seems quite prepared to accept the role that the plaintiff had alluded to him as representing the members of his family, as evident from his reply. The fact that no other action had also been filed against the others and the plaintiff's letter was only addressed to the defendant seem even more conclusive that the plaintiff was thus treating the defendant as representing the other members of the family. Can the plaintiff now therefore seriously complain that the defendant had no legal authority to act when he by his conduct seems to accept that he is. He must be estopped from doing so. In my view equity must come to the defendant's aid to clothe him with the necessary authority, otherwise a great injustice would be done when because of his failure to comply with a mere technicality due to no fault of his own and over which he had no control, he is deprived of a land and a roof over his head. Equity looks to the intent rather than the form and deems that as done which ought to be done. The defendant must be deemed to have the necessary capacity to defend until such time as one is formally appointed. I am to understand incidentally that the brother of the defendant has in fact since been appointed and extracted the Letter of Administration.

One is in some difficulty to understand the plaintiff's stand in this connection. In the normal course of things (through inspection and inquiry) he would have discovered that the defendant was in the process of extracting the Letter of Administration since he knew the vendor had only recently passed away. There is no question from what had come to pass that the application for the Letter of Administration would have been made at or about the time the plaintiff's present application was instituted or even earlier. Why has he nevertheless proceeded with the application before the Letter of Administration was extracted? If it is said that he was anxious nevertheless to proceed hastily it was open to him to apply to the Court under O. 15 r. 6A(4)(a) or r. 12(1) or 13(1) to have someone appointed to represent the estate or the other members of the family as the case may be. He could have even made the Public Trustee a party together with the respondent. If for his own reason

therefore he chose to bring the action before the defendant had no formal title then the defendant could hardly be blamed and he could hardly he heard to say that the defendant had no title. He cannot approbate and also reprobate. By his action he is deemed to have waived any defect that the defendant may have to defend. Indeed by his conduct it seems clear that he had impliedly conceded that he had, as the following circumstance will bear out. The proposition that the residual beneficiary has no beneficial interest was rooted, as far as Counsel's argument proceeded, on the authority of *Lee Ah Thaw v. Lee Chun Tek* which says that a beneficiary has no interest to caveat a land as against the executor until the administration is completed. One will recall however that in our case the defendant had caveated the land the subject of this action. However, no application had been made by the plaintiff to set it aside as he was rightfully entitled to do. Can this inaction therefore be not an outstanding manifestation of the plaintiff's readiness to treat the defendant as being qualified to defend. I should certainly think so. He must therefore be now prevented from saying that the defendant is unqualified to defend.

It is to be noted also that the rule that the residuary legatee or beneficiary has no capacity was based on a preponderance of cases where the beneficiary himself had taken a positive step to assert his right by bringing an action, as against the right of an administrator or executor who had been appointed. Whatever equity he had it cannot therefore supersede that of those legally appointed. An equitable remedy can only be used essentially as Lord Birkett said in *Combe v. Combe* [1951] 3 KB as a shield not a sword, and equity follows the law. Before me the defendant was not attempting to assert a positive right of ownership as against anyone. He is not in the position of the plaintiff but the defendant. He is merely saying that he has sufficient beneficial interest or equity to be allowed to stay on the land until the Letter of Administration is granted. In that sense he says he cannot be denied the right to defend the plaintiff's action. I cannot see anything defective in that line of argument.

How valid therefore is the plaintiff's application for a mandatory injunction at this stage? It would be observed that there was a serious allegation of fraud and misrepresentation being made in the present application as well as in the defendant's defence against the plaintiff, but the latter had not adverted to them. His Counsel has said no further to suggest that the defendant's/respondent's allegation of fraud has no merit whatsoever. The principle underlying the grant of a mandatory injunction summarily need no elucidation. *Halsbury* 4th. Edn. Vol. 24 p. 534 says

> A mandatory injunction can be granted on an interlocutory application as well as at the hearing , but in the absence of special circumstances, it will not be granted. However, if the case is clear and one which the Court think ought to be decided at once or if the act done is a simple and summary one which can easily be remedied, or if the defendant attempts to steal a march on the plaintiff a mandatory injunction will be granted.

Can the plaintiff's case be said therefore to be so clear that the Court must act at once and I venture to ask, can the plaintiff's case be said to be fairly conclusive and certain that a trial would clearly be pointless and redundant. With great respect, considering the evidence which has so far been adduced by the respondent: I very much hesitate to say so, as I shall seek to explain. The 1st. Agreement had not been challenged or disputed stated the price of the land to be for the sum of RM27,500 of which RM5,000 as deposit had been received leaving a balance of RM22,000 to be paid. This was for an area of 2,500 sq. ft. The 2nd Agreement also not disputed nor challenged says that it was for the sum of RM72,623.65 of

which RM10,000 deposit had been paid leaving a balance of RM62,623.65 for an area of 6,602.5 sq. ft. The total consideration for the whole land would land would therefore be RM100,123.65 of which RM15,000 in the form of deposit had been paid. The sum due for the whole land would therefore be RM84,623.65 of which RM72,623.65 consideration only from the evidence adduced, had been paid leaving a balance of RM12,000 unpaid. But the transfer form shows that the transfer was of the whole land and the consideration was for RM72,623.65 which under the 2nd. Agreement was the consideration for the sale of a portion only of the land. Clearly therefore there are vital and grave contradictory terms between the agreement and the transfer. The 2nd Agreement says only 6,000 sq. ft. or so had been sold, whereas the transfer says that the whole land had been sold. Even if it is true that the whole land had been sold, there is by virtue of the 1st. Agreement, still a balance of RM22,000 unaccounted for and apparently not paid by the plaintiff. As stated earlier the plaintiff had not attempted to explain, let alone adduce evidence to contradict the defendant's assertion and the documents he had adduced in support. It becomes a serious question therefore to be tried whether these grave contradictions would not support the defendant's allegation that the land had been transferred as a result of fraud or misrepresentation, which would be a valid reason therefore for setting it aside.

There had also been inordinate delay in the plaintiff filing this application for which the remedy of an injunction cannot be allowed. Halsbury at p. 536 says " a person seeking a mandatory injunction should apply promptly, but mere delay is not a bar if it can be satisfactorily accounted for." The plaintiff's delay in bringing this application was for about 9 months and he has not given any explanation for his dilatoriness in acting promptly and with expedition, particularly bearing in mind that he had every opportunity to do so.

I would in the circumstances dismiss the application with costs.

Also found at [1983] 2 CLJ 222